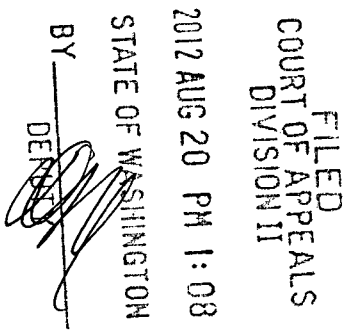
No. 42892-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II



STATE OF WASHINGTON

Respondent

vs.

RAYMOND CLAIR CONNOLLY

Appellant

ON APPEAL FROM THE SUPERIOR COURT FOR CLARK COUNTY
The Honorable Barbara Johnson
Superior Court No. 11-1-01022-8

APPELLANT'S REPLY BRIEF

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I. ISSUES RAISED BY RESPONDENT'S BRIEF

1. Did appellant's trial counsel preserve an objection to the court's disqualification of a sitting juror for "bias?"

2. Did the record support actual "bias" on the part of the disqualified juror?

II. ARGUMENT IN REPLY

A. Trial counsel preserved an objection to the court's ruling which disqualified a juror for "bias".

The state argues that this court should not review the assignment of error regarding the disqualification by the trial court of a sitting juror for "bias". This argument should be rejected because trial counsel did make clear to the trial court that the juror should be retained.

The court notified the parties that the bailiff had received a note from one of the jurors, which said that after she testified, he recognized Michelle Fleishman, a witness called in the state's case in chief as someone who had waited on him at a restaurant. RP II 279. After each side had the opportunity to ask questions of the juror, the state asked that he be replaced with an alteranate. RP II 284. Trial counsel clearly indicated the motion should be denied: "No, I think he's fine, your Honor." RP II 284. The court then denied the motion to disqualify the juror. RP II 284.

Without making any further inquiry of the juror, the court ruled on what it characterized as a renewal of the request by the prosecutor to disqualify the juror. RP II 292. When confronted with this *fait accompli*

ruling, defense counsel stated: "And just for the record I am – am opposed to that, but I've already said that so...." RP II 293.

The defense position on the retention of the juror was clear from both of trial counsel's brief comments. He initially told the court that the juror should be retained, and the court's initial ruling did so. When the court ruled the second time, trial counsel indicated he was opposed to the ruling. While he did not say he "objected" to the ruling, it was clear that he felt the court had erred. No further objection was necessary. Also, since trial counsel made his comments "just for the record", it was clear that he wanted his position noted for the purposes of a potential appeal.

B. The error is reviewable pursuant to RAP 2.5 (a).

Assuming *arguendo* that trial counsel's comment that he "opposed" the court's action "for the record" did not sufficiently place the trial court on notice of his position, this court should nevertheless review the error pursuant to RAP 2.5 (a). A party may ask this court to consider an error that was not preserved in the trial court if the error involves a "manifest error affecting a constitutional right."

A defendant in a criminal case has the constitutional right to a jury trial under Const. art I, §22 of the Washington Constitution, and under the Sixth Amendment to the United States Constitution. *State v. Gonzales*, 111 Wn. App. 276, 45 P.3d 205 (2002). The right to trial by jury encompasses the "valued right to have [a] trial completed by a particular tribunal." *State v. Daniels*, 165 Wn. 2d 627, 200 P.3d 711 (2009); *State v.*

Wright, 165 Wn. 2d 783, 203 P.3d 1027 (2009), (quoting *Richardson v. United States*, 468 U.S. 317, 325, 104 S. Ct 3081, 82 L.Ed 2d 242 (1984), quoting *Wade v. Hunter*, 336 U.S. 684, 688-89, 69 S.Ct. 834, 93 L.Ed.974 (1949)). The trial court error here is thus a manifest error which affected the constitutional right to a jury trial, and is reviewable under RAP 2.5 (a) even if trial counsel's comments did not properly preserve the issue for appeal.

C. The trial court abused its discretion since there was no showing of "actual bias" which would support disqualification of the juror.

The prosecutor urges that the trial court's decision should be upheld based on the tenuous acquaintance between the witness, Ms. Fleishman, and the juror, Mr. Sarasong. However, the requirements of the statute, that there be a showing of "actual bias", were not met here. Since the trial court did not utilize the correct legal standard, it abused its discretion in disqualifying the sitting juror.

A juror may be challenged for either "implied bias" or "actual bias." RCW 4.44.170.[1] ; *Kuhn v. Schall*, 155 Wn. App 560, 228

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[1]

RCW 4.44.170
Particular causes of challenge.

Particular causes of challenge are of three kinds:
(1) For such a bias as when the existence of the facts is ascertained, in judgment of law disqualifies the juror, and which is known in this code as implied bias.
(2) For the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging, and which is known in this code as actual bias.

P.3d 828 (2010). Implied bias is not present in this case, because none of the necessary relationships between the juror and the witness were in play, nor between the juror and a party. RCW 4.44.180.[2] Actual bias was not shown, because the record did not demonstrate "the existence of a state of mind on the part of the juror which [could satisfy] the court that the [juror] [could] not try the case impartially and without prejudice to the substantial rights" of the state, the party challenging the juror.

When questioned about how he knew Ms. Fleishman, Mr. Sarasong told the court she was a waitress at Shari's, where he sometimes had breakfast. He did not know her name. He did not know her personally. He had no preconceived idea about her credibility. He did not have her as

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(3) For the existence of a defect in the functions or organs of the body which satisfies the court that the challenged person is incapable of performing the duties of a juror in the particular action without prejudice to the substantial rights of the party challenging.

[2]

RCW 4.44.180
Implied bias defined.

A challenge for implied bias may be taken for any or all of the following causes, and not otherwise:

(1) Consanguinity or affinity within the fourth degree to either party.
(2) Standing in the relation of guardian and ward, attorney and client, master and servant or landlord and tenant, to a party; or being a member of the family of, or a partner in business with, or in the employment for wages, of a party, or being surety or bail in the action called for trial, or otherwise, for a party.
(3) Having served as a juror on a previous trial in the same action, or in another action between the same parties for the same cause of action, or in a criminal action by the state against either party, upon substantially the same facts or transaction.
(4) Interest on the part of the juror in the event of the action, or the principal question involved therein, excepting always, the interest of the juror as a member or citizen of the county or municipal corporation.

his waitress every time he went to Shari's, she was just one of the waitresses there. He did not know her that well, and would not find her testimony more credible based on this acquaintanceship with her. He reaffirmed that he did not think this would affect his ability to be a fair and impartial juror. RP II 282-283. There was nothing in the record which would support a finding of actual bias, which was the only basis for excluding the juror.

In *State v. Perez*, 166 Wn. App. 55, 269 P.3d 372 (2012), defendant moved for a new trial after it was discovered that one of the jurors might have known the defendant and his father, and knew of a police report involving him and had not disclosed this fact during jury selection. When examined by the court before sentencing, the juror disclosed that he had heard rumors about Mr. Perez that he was a "black sheep", or had misbehaved. The Court of Appeals concluded that the trial court had not erred in denying the motion for a new trial, since Perez had not demonstrated that the standards for a challenge for cause had been met.

In *State v. Birch*, 151 Wn. App. 504, 213 P.3d 63 (2009), the defendant in a robbery case argued that a juror who worked in banking for a 10 year period was actually biased, and that it was error to deny his cause challenge to this juror. The bank employee/juror, who had been trained in how to respond in robbery situations, testified during *voir dire* that she could follow the court's instructions and set aside any

preconceived notions she had. The court held that Birch had not shown anything beyond the "mere possibility" of prejudice on the part of the juror, and held it was not error to fail to dismiss the juror. 151 Wn. App. at 512-513.

In *State v. Wilson*, 141 Wn. App. 597, 171 P.3d 501 (2007), Wilson was charged with theft from a Rite Aid store. He argued that the trial court erred in failing to excuse a juror for cause, because the juror had formerly worked for Rite Aid and knew one of the state's witnesses, who was also a Rite Aid employee. She did not know him personally, but knew he worked in loss prevention. 141 Wn. App. at 602. She told the trial judge it did not matter to her personally that Rite Aid was a victim in one of the counts being tried. The Court of Appeals held that neither implied nor actual bias had been shown, and there was no legal basis for excusing the juror. 141 Wn. App. at 608.

In *State v. Grenning*, 142 Wn. App. 518, 174 P.3d 706 (2008), the Tacoma News Tribune ran an article about Grenning's case on the first day of trial. A juror read the headline, but did not continue with the article. The trial court denied the challenge to the juror, and the Court of Appeals affirmed, noting that even equivocal answers by a juror would not justify a removal for cause. 142 Wn. App. at 540-541.

Conversely, in *State v. Gonzales*, 111 Wn. App. 276, 45 P.3d 205 (2002), defendant challenged a juror for cause who had expressed significant reservations about her own fairness if asked to compare the

significant reservations about her own fairness if asked to compare the testimony of a police officer against that of Gonzales. She was not sure she could afford Gonzales the presumption of innocence if an officer testified. The trial court denied the challenge. The Court of Appeals reversed, noting that the juror had demonstrated actual bias in her comments, and had not expressed her ability to try the case impartially despite her feelings about police officers in general. 111 Wn. App at 282.

In the present case, the record does not demonstrate that Mr. Sarasong was biased, and therefore subject to removal by the trial court. The collected cases show when the standard for establishing juror bias has been met, and when it has not. In the case at bar, it was not. As in *Wilson* and *Perez*, the mere fact that he was acquainted with a witness for a party did not disqualify him. Even assuming his answers to the court's and counsel's questions about the acquaintance were equivocal, that would not justify his removal, under the authorities cited in *Grenning*. The record does not even demonstrate the "mere possibility" of prejudice that was deemed insufficient in *Birch*. Finally, unlike the juror who should have been removed for cause in *Gonzales*, the juror here had affirmatively told the court his tenuous acquaintance with Ms. Fleishman would *not* affect his ability to deliberate fairly. In short, the court abused its discretion in removing this juror, since there had been no demonstrable showing that he was biased against one party.

decision, citing *State v. Gentry*, 125 Wn. 2d 570, 888 P.2d 1105 (1995). *Gentry* is not on point at all. In *Gentry*, there was no issue at all regarding excusing a sitting juror because of "bias". Secondly, Gentry's lawyer made no objection to what the opinion characterizes as an "inadvertent" replacement of a regular jury by an alternate, and indeed participated in that decision. The court characterized the replacement as a procedural matter, and held that it could not be raised for the first time on appeal. The court added in *dicta* that no prejudice had been shown.

In the present case, unlike *Gentry*, the court excused a sitting juror on the basis of perceived bias rather than inadvertently. Defense counsel objected, preserving the issue, again, unlike *Gentry*. As a result, Mr. Connolly's "valued right to have his trial completed by a particular tribunal" was violated. This court should reverse his conviction and remand for a new trial.

III. CONCLUSION

Trial counsel adequately preserved an objection to the trial court's decision to disqualify a sitting jury for alleged "bias" by noting that he was opposed to the court's decision after it was announced. Even if the objection was somehow deficient in alerting the trial court to the defense position, this court should nevertheless review the issue pursuant to RAP 2.5 (a) as a manifest error affecting the constitutional right to jury trial.

The record does not support the trial court's decision to disqualify the juror for "bias." Actual bias, as defined in RCW 4.44.170, was not

shown. Implied bias, as defined in RCW 4.44.180, was not shown. Washington cases do not allow disqualification of a juror merely because the juror may be acquainted with a party or witness, which is all the record in this case reflects. The trial court abused its discretion in disqualifying the juror. This court should reverse the conviction and remand for a new trial.

Dated this 15 day of August, 2012

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CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a copy of: Appellant's reply brief, upon the following attorney of record and the Defendant at the addresses shown, by depositing the same in the mail of the United States at Vancouver, Washington, on the 17th day of August with postage fully prepaid.

DATED this 17th day of August, 2012

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